

Patience T. Huntwork
Bar. No. 005252
Staff Attorney, Arizona Supreme Court
1501 W. Washington, Suite 415
Phoenix, AZ 85007-3231
Telephone: (602) 452-3385
Facsimile: (602) 452-3482
E-mail: phuntwork@courts.az.gov

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)	
)	Arizona Supreme Court No. _
RULES 38.1 AND 38.2,)	
ARIZ. R. CRIM. PROC.)	
)	PETITION TO AMEND RULES 38.1 AND 38.2,
)	ARIZ. R. CRIM. PROC.
)	
_____)	

**PETITION TO AMEND RULES 38.1 AND 38.2, ARIZONA RULES OF CRIMINAL
PROCEDURE**

Pursuant to Rule 28, Rules of the Supreme Court, Patience T. Huntwork, Staff Attorney, Arizona Supreme Court, petitions the Court to amend Rules 38.1 and 38.2, Arizona Rules of Criminal Procedure, as reflected in the attachment hereto.

I. INTRODUCTION AND PROPOSAL

In 1978, Criminal Rule 38 was adopted to implement a Deferred Prosecution Program (“the Program”) set forth in A.R.S. § 11-361 et seq. A number of the provisions of Rule 38 require that certain actions be taken in the Superior Court, even if a deferred case was pending in a Justice Court.

These provisions have presented difficulties for the Superior Court, as they require it to manage additional cases. There is no discernable rationale for this requirement in Rule 38. A.R.S. § 11-361 et seq. does not include any provisions indicating that the Superior Court should

be the exclusive forum for particular actions taken under the Program. The 1993 amendments to Rule 38 seemingly sought to address the inconvenient nature of the provisions. *See* Ariz. R. Crim. P. 38.2, Committee Comment to 1993 Amendment (“substitut[ing] the word ‘court’ for ‘clerk’ to adapt the rule to the circumstances in all courts”) ; Ariz. R. Crim. P. 38.3, Committee Comment to 1993 Amendment (“delet[ing] the term ‘superior’ to adapt the rule to all courts”). Nevertheless, the rule still contains references to practices to be performed solely in the Superior Court.

This petition proposes that the comment to Rule 38.1 be amended to remove the word “superior” before “court” in the first sentence and to eliminate a requirement that motions to suspend prosecution “be filed in the superior court notwithstanding the fact that the case may be pending in the justice court.”

This petition further recommends that Rule 38.2(a) be amended to remove the word “superior” before “court,” thereby eliminating the requirement that a notice to resume prosecution under the Program be filed in the Superior Court. Similarly, the comment to Rule 38.2 should be amended to delete the word “superior” before “court” in the first sentence and to eliminate a procedure for the Superior Court to remand a resumed case to the justice court if the case was pending there.

II. CONCLUSION

Petitioner respectfully requests that the Court consider this petition and proposed rule change at its earliest convenience.

DATED this 10TH day of January, 2012.

Patience T. Huntwork
Staff Attorney, Arizona Supreme Court

ATTACHMENT¹

ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 38.1. Application for suspension order

- a.** Whenever after the filing of a complaint, indictment or information, but prior to a plea of guilty or trial, the prosecutor determines that it would serve the ends of justice to suspend further prosecution of a defendant so that he or she could participate in a deferred prosecution program, the prosecutor, with the consent of the defendant, may, by written motion, apply to the court for suspension of prosecution.
- b.** The motion of the prosecutor shall set forth facts showing that the defendant is a person legally eligible for participation in the deferred prosecution program, and a written consent signed by the defendant and his or her counsel, if any, agreeing to the participation by the defendant in the program shall be filed with the motion.
- c.** After the filing of a motion by the prosecutor as provided in this rule, the court may order that further proceedings be suspended for two years. If the defendant is in custody, the court may order him or her released.

Comment

The provisions of Rule 38 are intended to implement the Deferred Prosecution Program authorized by A.R.S. § 11-361 et seq.

~~The rule provides that the motion by the prosecutor to suspend prosecution be filed in the superior court notwithstanding the fact that the case may be pending in the justice court.~~

When the ~~superior~~ court suspends further prosecution so that a defendant may participate in a deferred prosecution program, the normal time limits required by Rule 8 for the commencement of trial of a criminal case are suspended.

Rule 38.2. Resumption of prosecution

- a.** If the prosecutor is not satisfied that the defendant has fulfilled the conditions of the deferred prosecution program, he or she may file a written notice with the ~~superior~~ court that he or she desires that the order suspending prosecution be vacated and that prosecution of the defendant be resumed. The prosecutor shall serve a copy of the notice upon the defendant in the manner provided by Rule 35.5
- b.** Upon filing of the notice to resume prosecution the court shall vacate the order suspending prosecution and order that the prosecution of the defendant be resumed. A copy of the order shall

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

be mailed by the court to the defendant and his or her counsel.

c. After prosecution is ordered resumed the defendant shall be tried within 90 days of the date of the order ordering the resumption of prosecution.

Comment

38.2(b). After prosecution is ordered resumed the ~~superior~~ court will make any other appropriate orders to resume the prosecution of the case from the phase it was in at the time prosecution was suspended. ~~If the case was pending in the justice court at the time prosecution was suspended, the superior court will remand the case to the justice court for resumption of proceedings in that court.~~

38.2(c). A new time limit for commencement of trial is provided when prosecution is ordered resumed. The 90-day time limit applies irrespective of the phase the case was in at the time prosecution was suspended.

Committee Comment to 1993 Amendment

The 1993 amendment to Rule 38.2(b) substituted the word “court” for “clerk” to adapt the rule to the circumstances in all courts.